

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KENNETH A. KESSLER,	)	
Employee,	)	FINAL DECISION AND ORDER
Respondent,	)	ON RECONSIDERATION
v.	)	
	)	AWCB Case No. 200208396
FEDERAL EXPRESS CORPORATION,	)	
Self-Insured Employer,	)	AWCB Decision No. 15-0163
Petitioner.	)	
	)	Filed with AWCB Anchorage, Alaska
	)	on December 31, 2015
	)	

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On December 11, 2015, *Kessler v. Federal Express Corp.*, AWCB Decision No. 15-0159 (*Kessler I*) denied in part and granted in part Kenneth A. Kessler's (Respondent) July 16, 2015 Petition to Strike Defense Medical Evaluations. *Kessler I* found Employer's Medical Evaluations (EMEs) conducted by Dr. Robinson as a psychiatrist and Dr. Bald represented unlawful physician changes, and ordered stricken from the record Dr. Robinson's June 1, 2013 physical report, Dr. Robinson's July 6, 2015 physical chart review, and Dr. Bald's August 10, 2015 report. *Kessler I* further ordered that all reports, opinions, and testimony of Dr. Robinson in his capacity as a psychiatrist and Dr. Bald, dating on or after July 9, 2011, will not be considered in any form, in any proceeding, or for any purpose related to this case. On December 28, 2015, Federal Express Corp. (Petitioner) timely requested reconsideration of *Kessler I*. On December 30, 2015, the matter was heard in Anchorage, Alaska on the written record. Attorney Michael Jensen represented Respondent and Attorney Vicki Paddock represented Petitioner. The record closed when the panel met to deliberate on December 30, 2015.

ISSUE

Petitioner contends reconsideration is warranted because EME physician Dr. Dietrich expressly and implicitly made a referral to Dr. Robinson's opinions as both a psychologist and a psychiatrist. Petitioner contends Dr. Dietrich's referral to Dr. Robinson as a psychiatrist was therefore not an unlawful change of physician, and all of Dr. Robinson's reports and subsequent referrals, including Dr. Bald, should remain in the record.

Respondent has not yet responded to the Petition for Reconsideration, but it is assumed he opposes it.

***Should Petitioner's December 28, 2015 Petition for Reconsideration be granted?***

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

- 1) On December 11, 2015, *Kessler v. Federal Express Corp.*, AWCB Decision No. 15-0159 (*Kessler I*) denied in part and granted in part Respondent's July 16, 2015 Petition to Strike Defense Medical Evaluations. *Kessler I* found EMEs conducted by Dr. Robinson as a psychiatrist and Dr. Bald represented unlawful physician changes. *Kessler I* all EME reports generated prior to July 9, 2011 to remain in the record, but ordered stricken Dr. Robinson's June 1, 2013 physical report, Dr. Robinson's July 6, 2015 physical chart review, and Dr. Bald's August 10, 2015 report. *Kessler I* further ordered that all reports, opinions, and testimony of Dr. Robinson in his capacity as a psychiatrist and Dr. Bald, dating on or after July 9, 2011, will not be considered in any form, in any proceeding, or for any purpose related to this case.
- 2) On December 29, 2015, Petitioner timely requested reconsideration of *Kessler I*, contending that by including Dr. Robinson in the physical examination, and signing off on Dr. Robinson's dictated report, Dr. Dietrich was expressly and implicitly referring to Dr. Robinson's opinions in both areas of his specialties. As such, Dr. Dietrich's referral to Dr. Robinson as a psychiatrist was not an unlawful change of physician. All of Dr. Robinson's reports, and subsequent referrals, should remain in the Board's record.

(Petition for Reconsideration of AWCB Dec. 15-0159, December 28, 2015.)

- 3) The December 28, 2015 Petition for Reconsideration contains no legal argument or evidence not taken into consideration in *Kessler I*. (Judgment, observations, and unique or peculiar facts of the case.)
- 4) Respondent's time to answer the Petition for Reconsideration expires January 20, 2016. To date no response has been received from Respondent. (ICERS computer database.)
- 5) The *Kessler I* findings of fact are adopted by reference here. (*Kessler I*)

### PRINCIPLES OF LAW

#### **AS 23.30.001. Intent of the legislature and construction of this chapter.**

It is the intent of the legislature that

(1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . .

. . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

#### **AS 44.62.540. Reconsideration.**

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted. . . .

"The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *George*

*Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A petition for reconsideration has a 15-day time limit for the request, and power to reconsider “expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied.” *Id.* at 743 n. 36. The board must give due consideration to any argument or evidence presented with a petition for reconsideration, but is not required to give conclusive weight to new evidence and has power to consider the new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955,957 (July 30, 1982).

### ANALYSIS

#### ***Should Petitioner’s December 28, 2015 Petition for Reconsideration be granted?***

A review of the entire record indicates *Kessler I* did not deviate from established law. Rather, *Kessler I* applied controlling Supreme Court and Alaska Workers’ Compensation Appeals Commission law, and explained the rationales for finding Dr. Robinson as a physiatrist and Dr. Bald to be unlawful physician changes, and for striking certain EME reports from the record. Petitioner’s Request for Reconsideration presented no new argument or evidence warranting reconsideration. *Whaley*. No legal error occurred and the Petition for Reconsideration will therefore be denied. *Easley*.

### CONCLUSION OF LAW

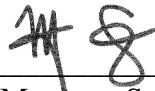
Petitioner’s December 28, 2015 Petition for Reconsideration should not be granted.

### ORDER

Petitioner’s December 28, 2015 Petition for Reconsideration is denied.

Dated in Anchorage, Alaska on December 31, 2015.

ALASKA WORKERS' COMPENSATION BOARD



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Margaret Scott, Designated Chair

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David Kester, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of KENNETH A. KESSLER, employee / claimant; v. FEDERAL EXPRESS CORP., self-insured employer; Case No. 200208396; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on December 31, 2015.

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Vera James, Office Assistant